**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, DC 20554**



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| In the Matter of | ) | |
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| Federal-State Joint Board on Universal Service | ) | CC Docket No. 96-45 |
| | ) | |
| 1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanism | ) | CC Docket No. 98-171 |
| | ) | |
| Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990 | ) | CC Docket No. 90-571 |
| | ) | |
| Administration of the North American Numbering Plan and North American Numbering Plan Cost Recovery Contribution Factor and Fund Size | ) | CC Docket No. 92-237<br>NSD File No. L-00-72 |
| | ) | |
| Number Resource Optimization | ) | CC Docket No. 99-200 |
| | ) | |
| Telephone Number Portability | ) | CC Docket No. 95-116 |

## COMMENTS OF
## LOCKHEED MARTIN GLOBAL TELECOMMUNICATIONS, LLC

Lockheed Martin Global Telecommunications, LLC ("LMGT"),[1] by its undersigned attorneys, hereby submits its comments in response to the Federal Communications Commission's ("Commission") Notice of Proposed Rulemaking in the above-referenced

[1] LMGT was created pursuant to the merger of Lockheed Martin Corporation and COMSAT Corporation. Today, COMSAT Corporation is a wholly owned subsidiary of LMGT and an indirect subsidiary of Lockheed Martin Corporation.

proceedings.[2] In the *NPRM*, the Commission seeks comment on whether and how to streamline and reform the universal service contribution method in light of current market trends. Of particular interest to LMGT, the Commission seeks comment on whether to modify the limited international revenues exception for international service providers with minimal interstate telecommunications revenues.

While LMGT strongly supports the Commission's goal of universal service, it believes the current contribution method, as applied to international service providers, is fundamentally flawed and fails to comply with Section 254 of the Telecommunications Act of 1996 ("1996 Act"). In particular, the limited international revenues exception, commonly known as the "eight percent rule," can result in a primarily international carrier being forced to avoid interstate services altogether or incur operational losses on modest interstate traffic due to the confiscatory effect of the rules. LMGT submits that this inequitable result contravenes the Section 254 "equitable and nondiscriminatory" and "competitive neutrality" principles, thereby undermining competition in the interstate market. Accordingly, LMGT urges the Commission to act without delay to amend the limited international revenues exception in a manner that is fair to *all* international service providers and encourages rather than discourages competition in the market for interstate telecommunications services.

## I. THE COMMISSION SHOULD AMEND THE EIGHT PERCENT RULE TO ENSURE A CONTRIBUTION METHOD THAT IS BOTH "EQUITABLE AND NONDISCRMINATORY" AND "COMPETITIVELY NEUTRAL" AS REQUIRED BY SECTION 254 OF THE 1996 ACT

Section 254 sets forth six principles to guide the Commission in establishing policies for the preservation and advancement of universal service. These include the fundamental principle

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2 *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45; CC Docket No. 98-171; CC Docket No. 90-571; CC Docket No. 92-237; CC Docket No. 99-200; CC Docket No. 95-116 (rel. May 8, 2001) ("*NPRM*").

that contributions from all providers of interstate telecommunications services be both equitable and nondiscriminatory.[3] Further, pursuant to its authority under Section 254, the Commission added "competitive neutrality" as a seventh and final guiding principle. Thus, in establishing rules for universal service contributions, the Commission's primary goal must be the assurance that interstate telecommunications service providers contribute in a manner that is both equitable and nondiscriminatory to *all* parties. The Commission also must ensure that no carrier is given an undeserved advantage over another as a result of its rules.

### A. The Eight Percent Rule Results in Economic Disincentives to Provide Interstate Services and, Therefore, Is Discriminatory In Violation of Section 254

As LMGT has learned from direct experience, the Commission's contribution method as applied to certain international carriers is anything but equitable and nondiscriminatory. One of the most basic issues addressed by the Commission in its *Universal Service Order* was determining which service providers would fall within the scope of the term "telecommunications carrier," and which of those would be required to contribute to federal support mechanisms.[4] The Commission correctly determined that carriers providing international services *only* are exempt from universal service contributions. The Commission recognized that, by definition, foreign or international telecommunications are not "interstate" because they are not carried between states, territories or possessions of the United States. Despite this, the Commission initially decided that primarily international carriers with even the

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[3] To that end, Section 254 requires that "[e]very telecommunications carrier that provides telecommunications services shall contribute, on an equitable and nondiscriminatory basis," to the universal service support mechanisms established by the Commission. 47 U.S.C. § 254(d).

[4] *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776 (1997) ("*Universal Service Order*").

smallest amount of interstate traffic must contribute to universal service support based on their interstate *and* international revenues.

The Commission's decision requiring contributions from international service providers with any interstate traffic whatsoever was subsequently reversed and remanded in *Texas Office of Public Utility Counsel v. FCC*.[5] The eight percent rule was then adopted by the Commission on remand in an attempt to address the deficiencies cited by the Court.

Under the eight percent rule, primarily international service providers are not required to contribute based on international end-user revenues if their interstate end-user telecommunications revenues constitute less than eight percent of their combined interstate and international end-user telecommunications revenues.[6] In contrast, similarly situated international carriers with eight percent or more interstate revenues are required to contribute based on their combined interstate and international end-user telecommunications revenues. In adopting the eight percent rule, the Commission sought to prevent the universal service contribution from exceeding gross end-user revenues. However, enacting a rule that ensures that a primarily international carrier's universal service contribution will always be a few dollars less than its gross interstate end-user revenues avoids the real point of the Court's ruling. Moreover, as the Commission noted in the *NPRM*, the contribution factor already has increased to a level higher than the Commission ever anticipated, which, at a minimum, requires an increase in the percentage threshold for carriers to qualify for the exception.

Unfortunately, the eight percent rule creates the same punitive fee structure as that created by the original *Universal Service Order*. The eight percent rule simply cannot be

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5 *See Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999) ("*Texas OPUC*"). In reversing the Commission's decision in part, the Court was primarily disturbed by the fact that carriers, such as COMSAT, would be forced under the regime created by the *Universal Service Order* to operate at a loss.

6 *See* 47 C.F.R. § 54.706(c).

implemented in a nondiscriminatory manner. In the 1999 *Universal Service Remand Order*, the Commission asserted that the eight percent rule "addresses the [Fifth Circuit's] concerns regarding the potentially discriminatory impact of [its] previous assessment methodology," and predicted that "any competitive disparity claimed by COMSAT or by similarly situated carriers should be minimized" as a result of the new rule.[7] Simply stating that the Court's concerns have now been addressed does not make it so. Upon further analysis, that is indeed not the case.

The eight percent rule has significant disparate effect on carriers with large international and small interstate revenues, as opposed to carriers that provide only international services. Carriers providing only international service remain exempt from the contribution requirements and international carriers that have interstate end-user revenues that constitute up to 7.99 percent of their combined interstate and international revenues *also* will be exempted. However, international carriers that have interstate end-user revenues that, for example, constitute 8.01 percent of their combined interstate and international revenues will be required to make a substantial payment – today, based on a 6.8823 percent contribution factor.

To look at this issue in real dollars, a carrier with $91.9 million of international revenue and $8.1 million of interstate revenue would, under the eight percent rule, be required to make a contribution of approximately $6.88 million – in effect, a fee equal to 85% of gross interstate revenues (see chart below). Once other costs associated with doing business are added, this confiscatory fee level makes it virtually certain that the interstate service would be provided at a loss. Conversely, a carrier with $92.1 million of international revenue and $7.9 million of interstate revenue would be required to contribute $543,520; a carrier with $100 million in international revenues and no interstate revenue would pay nothing.

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[7] *Federal-State Joint Board on Universal Service,* FCC 99-290, Sixteenth Order on Reconsideration and Eighth Report and Order, CC Docket no. 96-45 (rel. Oct. 8, 1999) ("*Universal Service Remand Order*").

COMPARISON OF USF CONTRIBUTION OF VARIOUS
INTERNATIONAL CARRIERS WITH $100 MILLION IN REVENUES

| | International Revenues | Interstate Revenues | USF Contribution | USF as % of Interstate |
|---|---|---|---|---|
| Carrier A | $100M | 0 | 0 | 0 |
| Carrier B | $92.1M | $7.9M | $543,520 | 6.88% |
| Carrier C | $91.9M | $8.1M | $6.88M | 85% |
| Carrier D | $50M | $50M | $6.88M | 13.76% |

Other than the differing interstate revenue percentages – which need not differ much at all to give rise to the distinction between contributor and noncontributor – these classes of carriers are similarly situated and are being treated differently. For example, Carrier C's contribution is 12 times larger than that of Carrier B.

### B. The Eight Percent Rule Fails to Create Equitable Market Conditions

For similar reasons, primarily international carriers with at least eight percent interstate revenues as calculated using the Commission's formula remain in a position where it is economically preferable to exit the interstate market rather than incur the obligation to make substantial universal service payments. Indeed, as a result of this rule, when considering whether to begin offering an interstate service, international carriers are faced with the possibility that providing that service will remove it from the eight percent exception and subject it to a contribution requirement that will make the new offering uneconomic. In many cases, the resulting universal service liability will eliminate any profits from the new service, and force the carrier to operate at a loss, thus creating a substantial barrier to entry and impeding competition in contribution of the principle of competitive neutrality. As noted above, for example, a carrier with $91.9 million in international revenues will be faced with a fee of $6.88 million if it offers an interstate service which generates $8.1 million in revenue. The remaining $1.2 million would have to be enough to cover all other costs of service plus a profit in order for this fee to be

equitable. Obviously, a fee equal to more than 85% of gross revenues does not leave sufficient monies to make the service offering viable. LMGT submits that these uneconomic considerations undermine Section 254's requirement that universal service fees be "equitable."

Not surprisingly, this inequity has been raised by others as well. Just recently, Loral Cyberstar, Inc. filed a *Petition for Reconsideration or Waiver* of the universal service requirements on the basis that it will be required to contribute more to the universal service fund than it earns from the sale of interstate telecommunications revenues.[8] As Loral Cyberstar exemplifies, this circumstance, not the mere example of LMGT, is what makes the Commission's rule inequitable and inconsistent with Section 254 and the Court's ruling.

### C. The Eight Percent Rule Treats Similar Carriers Differently and, Thus, Is Not Competitively Neutral

The disparate treatment of similarly situated international carriers also violates the seventh principle of competitive neutrality because it forces service providers to make business decisions based on their obligations to contribute to federal support mechanisms. Both the Commission and the Joint Board have stated that service providers should not be forced to make business decisions based on their universal service obligations.[9] Unfortunately, the eight percent rule has just that effect. Each time an international service provider considers whether to pursue a business opportunity involving interstate services, it must consider whether obtaining the business will take it over the eight percent threshold. These barriers to entry are inconsistent with the principle of competitive neutrality. Consequently, the Commission should amend the eight percent rule so that market entry decisions are based on sound economic reasons and not unduly influenced by the costs associated with regulatory compliance.

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8 *See In the Matter of Revised Telecommunications Reporting Worksheet (FCC Form 499-A) for April 2, 2001 Filing, Petition for Reconsideration or Waiver*, CC Docket No. 98-71 (filed April 2, 2001).

9 *Universal Service Order* at 9202.

## II. THE COMMISSION HAS MANY ALTERNATIVES TO THE EIGHT PERCENT RULE TO ERADICATE THE DISPARATE IMPACT ON PRIMARILY INTERNATIONAL CARRIERS

There are many alternatives to the eight percent rule that would satisfy all of the requirements and principles of Section 254, including the principle that the universal service support mechanisms be specific, predictable, and sufficient. Of course, the simplest and most equitable alternative would be to exclude international revenues from the contribution base entirely. In that regard, it is worth noting that Section 254 does *not* require "all interstate telecommunications providers to contribute without regard to whether those providers' revenues are interstate or international."[10] Rather, the Commission has discretionary statutory authority to exclude international revenues from the contribution base to ensure that universal service contributions are made on an equitable and nondiscriminatory basis.

Another approach would be to establish a sliding contribution scale, which would ensure that the amount of a carrier's contribution based exclusively on its international revenues never exceeds the amount of its contribution based on its interstate revenues. For example, a carrier with $92 million in international revenues and $8.1 million in interstate revenues could be asked, using the current contribution factor, to pay 6.8823 percent on its interstate revenues and an equal amount (*not* an equal percentage) on its international revenues. The sliding scale would apply until the interstate and international revenues comprise an equal share of the contribution base (*i.e.* 50/50). Once the interstate revenue exceeds 50% of the total interstate and international revenues, the contribution factor would be applied to the total sum. Alternatively, the Commission could retain a bright-line rule, but base it on a threshold higher than eight percent – such as 30 to 50 percent. This would not solve the problem of universal service

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[10] *Universal Service Remand Order* at ¶ 22.

obligations affecting business decisions (because with any bright line rule, the carrier would always be faced with a go/no go decision as it approached the X% threshold) – but it would at least make it possible for primarily international carriers to offer interstate services at a net profit.

In any event, regardless of the approach the Commission uses, LMGT urges the Commission to amend its current Reporting Worksheet for universal service to eliminate the requirement that filers include the interstate and international revenues of the filer and all of its affiliates in calculating the applicability of the interstate telecommunications revenues exception. The Commission, without notice and opportunity for comment, revised the April 2001 Worksheet to require combined filer and affiliate revenues on the *de minimis* worksheet. This revision not only violates the Commission's own rules of procedure, but is a complete departure from the Commission's past practices which treated each affiliate separately. As a result, some carriers previously exempt from universal service contribution suddenly find themselves subject to substantial contribution requirements without any forewarning or opportunity to budget. Such whimsical changes to the contribution method violate the Section 254 principle requiring specific and predictable support mechanisms, as well as the Administrative Procedure Act. Moreover, the result violates the "equitable and nondiscriminatory" principle because carriers previously exempt, such as Loral Cyberstar, now have contribution obligations in excess of interstate revenues generated. Thus, to avoid such unjust results in the future, LMGT respectfully requests that the Commission amend the *de minimis* worksheet to require revenue information for the reporting carrier only. Further, the Commission should retroactively permit carriers to recalculate April 2001 contributions using the *de minimis* (and international exception) calculation method included in the January 2001 worksheet.

Finally, the Commission seeks comment on whether and how to modify the limited international revenues exception if it adopts a flat-fee contribution method. As a general matter,

LMGT opposes any contribution method that calculates contributions based on the number of lines or accounts as opposed to revenue. LMGT believes that a flat-fee method would seriously undermine a subscriber's ability to control telecommunications service costs. Moreover, LMGT believes that a revenue-blind method would likely disproportionately burden certain carriers because a larger number of lines or accounts does not automatically translate into higher revenues. However, should the Commission determine that a flat-fee contribution method is appropriate, LMGT once again submits that contributions must be based on interstate services provided. Accordingly, any flat-fee contribution should be assessed based on the lines or accounts used primarily for interstate services.

## CONCLUSION

For all the foregoing reasons, LMGT urges the Commission either to eliminate the contributions based on international revenues altogether or adopt an alternative contribution method, as proposed by LMGT herein.

Respectfully submitted,

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